Supreme Court, U.S.
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No. 99-1343

In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON CO.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent corporation of Respondent Commonwealth Edison Company is Unicom Corporation, which is a publicly held company that owns more than 10% of Commonwealth Edison Company's stock.

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STATEMENT OF THE CASE

Respondent, Commonwealth Edison Company ("ComEd"), is a "public utility" as that term is defined in the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (the "Public Utilities Act" or the "Act"), that provides, *inter alia*, electric utility service to customers located in northern Illinois. Petitioner, Richard C. Moenning ("Moenning"), is an attorney and is also one of ComEd's customers. (Petition for a Writ of Certiorari (the "Petition") at 2).

On October 15, 1997, Moenning filed a formal complaint (the "Complaint") against ComEd with the Illinois Commerce Commission (the "Commission"), which is also a respondent here. (App. 1-4). The Commission regulates "public utilities" like ComEd in accordance with the Illinois Public Utilities Act. 220 ILCS 5/4-101. The Commission has jurisdiction over such complaints pursuant to section 10-108 of the Act. 220 ILCS 5/10-108.

Moenning alleged in his Complaint that "on or about June 11, 1997," ComEd "discontinued service" to his residence located in Evanston, Illinois. (App. 2). ComEd "restored service" later on that "same day," but subsequently required Moenning to make a $150 deposit in order to receive future electric service. (App. 2-3). Moenning alleged in his Complaint that, *inter alia*, the sections of the Illinois Administrative Code that permitted ComEd to require a deposit in these circumstances deprived him of "property interests without due process of law." (App. 3).

ComEd moved to dismiss Moenning's Complaint (App. 5-12), and stated that Moenning's electric service had been disconnected because Moenning "had failed to

pay the amount due on his [ComEd] account." (App. 7). ComEd also stated that after Moenning's service was restored, it had required that Moenning make a deposit as a condition of continued service as was provided for in the Illinois Administrative Code sections duly promulgated by the Commission. (App. 8 citing 83 Ill. Admin. Code §§ 280.50 & 280.60(e)).

ComEd moved to dismiss Moenning's Complaint because Moenning previously had raised the same contentions as those raised in the Complaint in two prior actions against ComEd. In both of those cases, the Commission had found that the Illinois Administrative Code sections that permitted ComEd to require customer deposits were consistent with the requirements of due process. (App. 9 citing *Moenning v. Commonwealth Edison Co.*, No. 81-0382, Order dated July 7, 1983; *Moenning v. Commonwealth Edison Co.*, No. 83-0475, Order dated November 20, 1984). Moenning had also raised the same claims against another utility after his telephone service was disconnected. In that case, the Illinois Appellate Court had rejected Moenning's claim that similar security deposit provisions of the Administrative Code violated due process. (App. 9 citing *Moenning v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E.2d 980 (1st Dist. 1985)).

Moenning responded to ComEd's Motion to Dismiss and did not deny that his electric service had been disconnected because he had not paid his electric bills. (App. 13-19).

On September 23, 1998, the Commission entered an Order (the "Order") granting ComEd's Motion to Dismiss

and denying Moenning's Complaint. (Petition, App. 1-7). The Commission concluded that there were no "outstanding issues of fact" that prevented the granting of ComEd's Motion. (Petition, App. 7). The Commission also rejected Moenning's due process claim, stating:

> The Commission is mindful that Complainant has filed several complaints before the Commission in the past. We find that the Orders entered in those dockets, involve a thorough review of the same allegations and issues challenging the regulations governing deposits presented as in the instant complaint. We find no compelling evidence presented in this complaint that would cause us to revisit those issues. We are of the opinion that the allegations and arguments presented by Complainant in both his Response to the Motion to Dismiss as well as his Brief on Exceptions amount to groundless assertions, are clearly without merit, and must be rejected.

(Petition, App. 6-7).

Moenning then attempted to appeal the Commission's Order through a number of filings with the Commission and the Illinois Appellate Court. On December 18, 1998, he filed a Notice of Appeal with the Commission Clerk (the "Notice of Appeal"). (App. 20-21). On December 24, 1998, he filed the same Notice of Appeal with the Appellate Court. (App. 22-25). Then, on January 20, 1998, Moenning filed a Motion for Leave to Appeal with the Appellate Court in which he requested leave to file a Petition for Review "as of December 24, 1998," a date almost one month earlier. (App. 26-29). On January 27, 1998, the Appellate Court allowed Moenning to file the Petition for Review. (Petition, App. 12).

ComEd moved to dismiss Moenning's appeal because: 1) Moenning failed to file his Notice of Appeal with the Appellate Court within five days after serving it on the Commission as required by § 10-201 of the Public Utilities Act; 2) Moenning did not file a Petition for Review with the Appellate Court within the time limits provided for in the Public Utilities Act or the Illinois Supreme Court Rules; and 3) Moenning did not name the Commission as a respondent in the Notice of Appeal as required by the Illinois Administrative Code. (App. 30-36). The Appellate Court granted ComEd's Motion and dismissed Moenning's appeal over Moenning's objection. (Petition, App. 13-14).

Moenning sought review by the Illinois Supreme Court, which was denied. (Petition, App. 16-18). Moenning now asks this Court to review his case, by writ of *certiorari*. In doing so, he claims that the Commission's Order was in excess of its "statutory authority" and that it therefore violated his due process rights. (Petition at 4-6).

REASONS FOR DENYING THE PETITION

There are a number of reasons for denying the Petition. First, the Illinois Appellate Court's dismissal of Moenning's appeal constitutes an "independent and adequate state-law ground" for the state court's judgment in this case that, pursuant to the decisions discussed below, prevents this Court from reviewing Moenning's federal claims. *E.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997). Second, Moenning's own failure to properly perfect his

appeal means that there is no final judgment "rendered by the highest court in which a decision could be had" in this case, and that the requirements for this Court's jurisdiction pursuant to 28 U.S.C. § 1257 are not met. And third, even if this Court were to consider Moenning's due process claims regarding the Commission's Order, the Petition should still be denied because no due process violation occurred, and because the Petition identifies no issues worthy of this Court's review.

I.

THERE IS AN INDEPENDENT AND ADEQUATE STATE-LAW BASIS FOR THE JUDGMENT BELOW THAT PREVENTS THIS COURT'S REVIEW

As an initial matter, this Court should deny the Petition because there is an independent and adequate state-law basis for the state court's judgment in this case that precludes the review of Moenning's federal due process claims.

"With only rare exceptions," this Court has held that "in reviewing state court judgments under 28 U.S.C. § 1257" (which Moenning is invoking here), it will "not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision" it has been asked to review. *Adams*, 520 U.S. at 86. The purpose of this rule is to promote comity between the state and federal courts because, as the Court has noted, " 'it would be unseemly in our dual system of government' to disturb . . . state court judgments on a federal ground that the state court

did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)). The rule also prevents this Court from issuing advisory opinions on federal issues where the outcome of a case turned on a matter of local law. *See generally* 16B Charles Alan Wright, et al., *Federal Practice and Procedure* § 4021, at 311.

In this case, the Illinois Appellate Court expressly held that Moenning had not properly perfected his appeal from the Commission's Order under Illinois law. (App. 30-36; Petition, App. 13-14). The imposition of a state-law procedural bar – such as the dismissal of Moenning's appeal for his own failure to perfect it – can prevent a federal issue from being "properly presented" to the state court and preclude later Supreme Court review. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1990); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 398 (1990). The Court has recognized that "the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (citations omitted). When a state-law procedural rule has barred consideration of a federal claim below, a petitioner seeking review in this Court "must persuade [the Court] that state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. . . . " *Adams*, 520 U.S. at 87 (citing *Hathorn*, 457 U.S. at 262-65).

Here, the Appellate Court's decision that Moenning had not properly perfected his appeal is an "independent and adequate state-law" basis for the state court's judgment. Regardless of the merits of Moenning's federal claims (of which, as discussed below, there are none), the

Appellate Court's dismissal provides an independent state-law basis why further review in this case is not available, and why Moenning's current Petition for review in this Court should be denied.

Admittedly, this Court will consider whether a state procedural rule is "strictly or regularly followed" in determining whether it is an appropriate basis for barring review of a federal claim. *Swaggart*, 493 U.S. at 398; *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). That is certainly the case here. It is well settled under Illinois law that the procedures for effecting the right to appeal are entirely statutory and thus must be complied with to invoke Appellate Court jurisdiction. *E.g., People v. Carter*, 91 Ill. App. 3d 635, 638, 415 N.E.2d 17, 19 (1st Dist. 1980) ("the procedures for effecting th[e] right to appeal are purely statutory and must be complied with in order to invoke the Appellate Court jurisdiction"). The Illinois courts regularly dismiss appeals that fail to comply with state procedural rules, including appeals that fail to comply with the Public Utilities Act section and Illinois Supreme Court Rule at issue here. *See, e.g., McGaughy v. Illinois Human Rights Comm'n*, 165 Ill. 2d 1, 15-16, 649 N.E.2d 404, 411-12 (1995) (dismissing appeal for party's failure to name necessary parties as required by Supreme Court Rule 335); *Hoffman v. Illinois Commerce Comm'n*, 62 Ill. App. 3d 85, 87-88, 379 N.E.2d 42, 44 (1st Dist. 1978) (dismissing appeal for failure to file timely notice of appeal under precursor to § 10-201 of the Public Utilities Act). This is not a case where the Illinois courts have resorted to "novel" procedural requirements to "thwart" Moenning's efforts to raise his federal constitutional claims. *Ford*, 498

U.S. at 423 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958)).

Moenning cites to *Howlett v. Rose*, 496 U.S. 356, 366 (1990), where the Court held that "it is within our province to inquire not only whether [a federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision without any fair or substantial support." (Petition at 4). However, Moenning ignores the portion of the Court's opinion in *Howlett* that applies here, which states:

> When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law.

Howlett, 496 U.S. at 372 (citations omitted). This case involves the application of a "neutral state rule regarding the administration of the courts" that the *Howlett* Court correctly observed should not be disturbed. It does not

involve the denial of Moenning's federal rights by virtue of the imposition of state procedural rules that are "without any fair or substantial support." There is no reason to conclude that the Appellate Court resorted to the state-law procedural rules concerning the proper perfection of appeals from the Commission to avoid consideration of Moenning's federal claims. Moreover, Moenning does not (and cannot) claim that the Illinois appellate rules applied here should be preempted in favor of some alternative federal rule.

Finally, Moenning attempts to build a case in the Petition that there was an effort in the Appellate Court to rely on state procedural grounds to deny the review of his federal claims. In particular, he claims that this case raises the "perplexing question of whether [an] agency (i.e., the Commission) itself ought to control the process of judicial review." (Petition at 7). The gist of this argument appears to be Moenning's claim that the Commission somehow controlled the perfection of his appeal. Moenning claims, for example, that after he filed the Notice of Appeal with the Commission (App. 20-21), the appeal went "undocketed" in the Appellate Court "even as the time for appeal expired." (Petition at 7).

Moenning's contentions are incorrect. Moenning – not the Commission – controlled the perfection of his appeal in the Appellate Court. The relevant section of the Public Utilities Act says as much – it states that a party who has filed a notice of appeal with the Commission "shall, within 5 days after the service of such notice upon the Commission, file a copy of the notice . . . with the clerk of the court to which such appeal is taken, and thereupon the appellate court shall have jurisdiction over

the appeal." 220 ILCS 5/10-201(a). There is nothing perplexing. It was Moenning's own failure to follow the requirements of Illinois law that led to the dismissal of his appeal.

II.

THIS COURT HAS NO JURISDICTION BECAUSE THERE IS NO DECISION OF THE HIGHEST STATE COURT AVAILABLE FOR REVIEW IN THE PROCEEDINGS BELOW

Under 28 U.S.C. § 1257, this Court's jurisdiction extends to the review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" where specified federal rights are at issue. 28 U.S.C. § 1257(a). Because Moenning did not properly perfect his appeal from the Commission's Order, there is no judgment or decree "rendered by the highest court of a state in which a decision could be had" at issue in this case, and the jurisdictional requirements of § 1257 are therefore not satisfied.

Newman v. Gates, 204 U.S. 89 (1907) involved this very situation. There, review was sought in this Court from an action litigated in the Indiana state courts that involved consideration of federal issues. The Indiana Supreme Court, however, held that the appeal from the trial court had not been properly perfected and that the appellate court did not have jurisdiction. This Court thus held that it did not have jurisdiction to review the federal issues in the case because, as a result of the improper appeal, there was no decision from the "highest court where a decision

could be had," and that the prerequisites of this Court's jurisdiction were not met. The Court stated:

> Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution. . . . *In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court.* As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.

Newman, 204 U.S. at 95 (emphasis added).

The same result was reached in *John v. Paullin*, 231 U.S. 583 (1913), where, as in *Newman*, the state supreme court had held that a prior appeal was not properly perfected. Citing to *Newman*, the Court held that it did not have jurisdiction to review the federal questions the case presented, stating:

> As the Supreme Court of the State did not pass upon the merits of the case . . . but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the

> State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

John, 231 U.S. at 585 (citation omitted). Because the decision below "turned entirely upon a question of local law," the court held that the writ of error would be dismissed. *John*, 231 U.S. at 587.

Finally, one commentator has described the holdings of these cases in the following way:

> In addition to seeking review by the proper method, a litigant must comply with the requirements of state appellate procedure. If the state's highest court denies review for failure to comply with reasonable procedural rules, 'the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court.' In this setting, the requirement that state opportunities for appellate relief be exhausted becomes mingled with the independent state ground doctrine. Noncompliance with proper state procedural rules furnishes an independent and adequate state ground for refusing to consider the federal questions, as not properly presented to the highest state court.

16B Charles Alan Wright, et al., *Federal Practice and Procēdure* § 4007, at 133-34 (quoting *Newman*, 204 U.S. at 223) (citations omitted).

Newman and *John* are applicable here. Because Moenning did not properly perfect his appeal below, there is no judgment in this case "rendered by the highest court of a state in which a decision could be had. . . . " As a result, the requirements of this Court's jurisdiction pursuant to 28 U.S.C. § 1257 have not been met.

III.

NO DUE PROCESS VIOLATION OCCURRED IN CONNECTION WITH THE COMMISSION'S ORDER

Finally, even if this Court were to consider Moenning's due process claims concerning the Commission's Order (which it should not, for the reasons stated above), the Petition should still be denied. There are no issues discussed in Moenning's Petition that suggest that Moenning's due process rights were violated, or that substantial due process issues exist that warrant review by this Court.

The gist of Moenning's due process claim appears to be that the Commission made its "final decision without an evidentiary hearing. . . . " (Petition at 5). However, where, as here, the operative facts are undisputed, due process does not require the agency to hold an evidentiary hearing before resolving a claim. As one Court has observed, "[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." *Puerto Rico Aqueduct & Sewer Auth. v. United States Envtl. Protection Agency*, 35 F.3d 600, 606 (1st Cir. 1994), *cert.*

denied, 513 U.S. 1148, 115 S.Ct. 1096 (1995) (citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973)). Similarly, this Court has recognized that due process does not require an administrative agency to hold "a hearing when it appears conclusively from the applicant's pleadings" submitted to the agency "that the application cannot succeed." *Hynson*, 412 U.S. at 621.

The rule in these decisions is applicable here. The facts before the Commission were undisputed – Moenning's electric service had been disconnected because he had not paid his bills and he was then required to make a security deposit as a condition of future service. Based on these uncontested facts, the Commission concluded that Moenning's due process rights had not been violated. There was no need for a hearing because the few facts at issue were not in dispute.

Moenning also claims that the Commission "exceeded its jurisdiction" in denying his Complaint without holding a hearing. (Petition at 5). This contention, however, involves the scope of the Commission's jurisdiction under the Illinois Public Utilities Act. It was rejected by the Commission when it issued its Order. The scope of the Commission's jurisdiction turns entirely on an interpretation of an Illinois law and, as such, is not an appropriate subject for this Court's review.

Finally, even assuming that Moenning does raise a valid due process issue in his Petition (which he does not), the Petition should nonetheless be denied because Moenning has completely failed to demonstrate that the issue is worthy of review by this Court. This Court's Rules provide that review of state court decisions will be

extended only in certain circumstances, such as when a "state court of last resort" has decided "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" (Supreme Court Rule 10(b)), or where a state court has decided "an important question of federal law that has not been, but should be, settled by this Court." (Supreme Court Rule 10(c)). Moenning's Petition does not demonstrate that the due process issues discussed therein are of such significance that they are worthy of this Court's consideration pursuant to the requirements in the Court's Rules.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, ComEd respectfully contends that Moenning's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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FORMAL COMPLAINT

Illinois Commerce Commission
527 East Capitol Avenue
Post Office Box 19280
Springfield, Illinois 62794-9280

For Commission Use Only:

Case 97-0528

(Filed Oct. 15, 10:07 a.m. 1997)

Regarding a complaint

by Richard C. Moenning
(Person making the complaint)

against Commonwealth Edison
(Utility name)

as to an additional rate or charge of $150.00

(Reason for complaint)

in Evanston Illinois.

TO THE ILLINOIS COMMERCE COMMISSION, SPRINGFIELD, ILLINOIS:

My mailing address is 135 S. LaSalle Street, Suite 3600, Chicago, Illinois 60603

The service address that I am complaining about is 2210 FOrestview Road, Evanston, Illinois 60201

My home telephone number is [847] 869-3418

Between 8:30 a.m. and 5:00 p.m. weekdays I can be reached at [312] 263-0062

Commonwealth Edison (*respondent*) is a
(Full name of utility company)
public utility and is subject to the provisions of the Illinois Public Utilities Act.

In the space below, list the specific section of the law, Commission rule(s), or utility tariffs which you think are involved with your complaint.

220 ILCS 5/9-101; 83 Illinois Administrative Code Parts 280.50, 280.60, and 280.70

Have you contacted the Consumer Affairs Division of the Illinois Commerce Commission about this complaint?
X Yes ___ No

Has your complaint filed with that office been closed?
X Yes ___ No

Formal Complaint

1. Complainant has been and is a present customer of Commonwealth Edison since October 1, 1971, a period of 25 years, always at 2210 Forestview Road, Evanston, Illinois.

2. Commonwealth Edison alleges it "discontinued service on or about June 11, 1997, and restored service the same day; and, refuses complainant and Commission access to its records as "confidential."

3. There is no known or approved provision of applicable rules and regulations that makes Commonwealth Edison's allegations "confidential."

4. Commonwealth Edison demands complainant pay it an additional sum of money ($150.00) for its "confidential" discontinuance of service. The demand was made sometime in July or August 1997, and Commonwealth Edison asserts its right to discontinue service again unless complainant agrees it has the right to make any "confidential" discontinuance of service and to exact an additional rate or charge therefor.

5. The Commission has failed or refused to investigate complainant's "informal" complaint that Commonwealth Edison's records are not confidential, and agrees Commonwealth Edison can demand additional payment if its "confidential" records say service was discontinued.

6. The Commission has failed or refused to consider whether Sections 280.50, 280.60, and 280.70 of 83 Illinois Administrative Code were and are lawful and provide for a lawful rate or charge for electrical service that is not discriminatory given the allegations of Commonwealth Edison that it lawfully "discontinued" service on or about June 11, 1997.

7. Sections 280.50, 280.60, and 280.70 are unlawful and unregulated practices and procedures of Commonwealth Edison submitted to the Commission in violation of 220 ILCS 5/9-101 in that such sections provide for unjust, discriminatory, and unreasonable rates and charges prohibited and declared unlawful.

8. Sections 280.50, 280.60, and 280.70 are unconstitutional in that such practices and procedures deprive complainant and other public utility customers of their property interests without due process of law and by

systematic and discriminatory classifications, practices and procedures.

WHEREFORE, Complainant asks the Commission to declare Commonwealth Edison's customer or consumer records are not confidential and must be fully disclosed to the customer upon request without additions, deletions, or corrections; to award complainant a right of discovery to examine, copy, and verify computer entry statements, dates, times, and codes denied by Commonwealth Edison but relied upon by it to seek to impose an additional, unreasonable, and discriminatory rate and charge for electrical service; to temporarily and permanently enjoin enforcement of Sections 280.50, 280.60, and 280.70 as unjust, unreasonable, discriminatory rates, and charges; and to require Commonwealth Edison to furnish electrical service to complainant without unjust, unreasonable, and discriminatory rates.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

RICHARD C. MOENNING, Formal Complainant	:	
v.	:	97-0528
COMMONWEALTH EDISON COMPANY, Respondent	:	

COMMONWEALTH EDISON COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR DISMISSAL OF COMPLAINT

(Filed Mar. 23, 12:02 p.m. 1998)

Respondent, COMMONWEALTH EDISON COMPANY ("ComEd"), by its attorneys, submits this memorandum which supports its motion to dismiss the complaint filed against ComEd by Complainant Richard C. Moenning for failing to state a claim for which relief can be granted.

INTRODUCTION

Complainant alleges that the Commission's regulations concerning security deposits, namely Sections 280.50, 280.60, and 280.70, "are unlawful and unregulated practices and procedures of Commonwealth Edison" and that such sections are "unconstitutional." (Complaint, ¶¶ 4, 6, 7, 8). Complainant further alleges that ComEd treats certain records as "confidential" and refused to give him access to such records. (Complaint, ¶ 2).

Neither of these claims has any merit. Complainant fails to state a claim for which the Commission can grant relief under either the Illinois Public Utilities Act (220 ILCS 5/1-101 *et seq.*, as amended) (the "Act") or the Commission's rules and regulations. Nowhere in the Complaint does he point to any act or omission of ComEd that violates the law. Moreover, the Commission previously ruled against Complainant in two different proceedings involving substantially similar allegations, finding on both occasions that the Commission's regulations and orders concerning security deposits were lawful. (*Moenning v. Commonwealth Edison Company,* Docket No. 81-0382, Order dated July 7, 1983; *Moenning v. Commonwealth Edison Company,* Docket No. 83-0475, Order dated Nov. 20, 1984). As a result, the Complaint should be dismissed with prejudice.

ARGUMENT

Section 200.170(c) of the Commission's regulations requires that a complaint contain:

> [a] plain and concise statement of the nature of . . . the acts or things done or omitted to be done in violation, or claimed to be in violation, of any statute, or any order or rule of the Commission.

83 Ill. Admin. Code § 200.170(c); *see also* 220 ILCS 5/10-108. Complainant has failed to provide any such statement as to the nature of any alleged violation of a statute, or an order or rule of the Commission. Indeed, ComEd fully complied with the Commission's rules and

regulations and the Act in discontinuing Complainant's electric service.

The Complaint Raises No Contested Factual Issues

On July 11, 1997, Complainant's electric service was discontinued, pursuant to 83 Ill. Admin. Code § 280.130, because Complainant failed to pay the amount due on his account. The same day, Complainant paid the amount owed, and his service was reconnected. (*See* Complaint, ¶ 2). Pursuant to the rules and regulations of the Commission, ComEd required Complainant to pay a security deposit for continued service. (*See* Complaint, ¶ 4; 83 Ill. Admin. Code § 280.50, 280.60, and 280.70).

There is no dispute that Complainant's electric service was discontinued on June 11, 1997. While the complaint coyly says only that ComEd "alleges" that it discontinued service on that date (Complaint, ¶ 2), Complainant admitted on the record that his service had in fact been disconnected. (Transcript from Nov. 13, 1997, at 15).

The Complaint does not allege that Complainant's electric service was discontinued in error. Nor does the Complaint allege that such discontinuance violated the Act or any Commission regulation. Furthermore, there is no issue of fact as to whether ComEd demanded a deposit from Complainant after his service was discontinued. (Complaint, ¶ 4). ComEd does not deny this fact.

ComEd's Request For Deposit Is Indisputably Legal

The Commission's regulations and prior orders unquestionably allow ComEd to request a deposit from customers who have been disconnected for non-payment. Section 280.60(e) of the Commission's regulations states:

> A present customer whose service is discontinued becomes an applicant for service subject to the provisions of Section 280.50 herein for purposes of reconnection of his/her service.

83 Ill. Admin. Code § 280.60(e). Section 280.50, referenced above, allows a utility to require a deposit from an applicant for residential service who has previously failed to pay for past due utility service. 83 Ill. Admin Code § 280.50.

Here, Complainant failed to pay for electric service, and was discontinued as a result. Since he was disconnected for nonpayment of his bill, he became a new applicant for service subject to the payment of a security deposit as provided in the Commission's regulations. Such a deposit is explicitly authorized by the above sections of the Title 83 of the Illinois Administrative Code.

In addition, despite Complainant's bald allegations that Sections 280.50, 280.60, or 280.70 are unlawful, which allegations are addressed below, the Complaint contains no claim whatsoever that ComEd in any way violated these Sections when it requested such a deposit from him after the discontinuance at issue.

Complainant's Constitutional Claims Are Meritless And Were Previously Rejected

Complainant claims that the Commission's regulations governing deposits (Section 280.50, 280.60, and 280.70) are:

> unconstitutional in that such practices and procedures deprive complainant and other utility customers of their property interests without due process of law and by systematic and discriminatory classifications, practices and procedures.

(Complaint, ¶ 8). Complainant has previously filed two substantially similar complaints against ComEd and another against Illinois Bell Telephone, which also challenged the constitutionality of the Commission's orders and regulations authorizing security deposits. (*See* Docket No. 81-0382, Order dated July 7, 1983 (Attached as Exhibit A); Docket No. 83-0475, Order dated November 20, 1984 (Attached as Exhibit B); *Moenning v. Illinois Bell Telephone Co.*, 139 Ill. App. 3d 521, 487 N.E.2d 980 (1985) ("*Illinois Bell*") (Attached as Exhibit C)).

In all three cases, the Commission upheld the utility's right to require deposits when a customer has been discontinued for non-payment. And, in the *Illinois Bell* case, the Illinois Appellate Court upheld the Commission's finding that the security deposit requirement and termination of service did not give rise to a civil rights action or constitute a due process violation. *Illinois Bell*, 139 Ill. App. 3d at 527-28, 487 N.E.2d at 982.

Moreover, the Complaint contains no basis as to why Sections 280.50, 280.60, and 280.70 violate due process or

are discriminatory. Nor does the Complaint contain any facts or explanation that would distinguish this complaint from the other cases Complainant previously brought before this Commission. As such, this claim fails to state a claim on which relief can be granted, and should therefore be dismissed.

Complainant further claims that Sections 280.50, 280.60, and 280.70 are

> unlawful and unregulated practices and procedures of Commonwealth Edison submitted to the Commission in violation of 220 ILCS 5/9-101 in that such sections provide for unjust, discriminatory, and unreasonable rates and charges prohibited and declared unlawful.

(Complaint, ¶ 7). Again, the Complaint contains no facts or any explanation as to how such practices and procedures are unjust, discriminatory, or unreasonable or in any other way in violation of the Act.

Moreover, Complainant's allegation that these regulations are "unlawful and unregulated practices and procedures of Commonwealth Edison" is nonsensical. The deposit procedures contained in Sections 280.50, 280.60, and 280.70 have been properly adopted by the Commission as part of its rules and regulations and have the full power of law. Both the Commission and the Illinois Appellate Court have previously upheld these regulations. (*See Illinois Bell,* 139 Ill. App. 3d 521, 487 N.E.2d 980; *Moenning,* Docket 81-0382; and Moenning, Docket 83-0475). This claim should, therefore, be dismissed.

Complainant's "Confidentiality" Claim Is Immaterial And Moot

Complainant alleges that ComEd claimed that its records were "confidential" and that it refuses to give Complainant access to its records. (Complaint, ¶ 2). This allegation fails to state a claim for relief. The Complaint is void of any factual or legal basis upon which ComEd's alleged claim of "confidentiality" violates any law or any Commission regulation. Moreover, in response to discovery requests, ComEd has provided Complainant every relevant business record that he sought relating to the discontinuance in question. Because there is no remaining relief that can be granted to this particular Complainant, this issue is now moot. *Independent Coin Payphone Assoc. v. Illinois Commerce Commission*, 170 Ill. App.3d 958, 960, 524 N.E.2d 980, 981 (1st Dist. 1988).

CONCLUSION

For all of the foregoing reasons, Commonwealth Edison Company requests that the Illinois Commerce Commission grant its Motion For Dismissal of Complaint and enter an order dismissing the Complaint with prejudice.

Dated: March 20, 1998

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: /s/ Karen Kremer Mahoney
One of its attorneys

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

RICHARD C. MOENNING FORMAL COMPLAINANT V. COMMONWEALTH EDISON COMPANY RESPONDENT	)	97–0528

Richard C. Moenning's Response
In Opposition To Commonwealth Edison's
Motion For Dismissal Of Complaint

INTRODUCTION

Richard C. Moenning, herein sometimes "Moenning" or "Complainant", respectfully makes Response to Commonwealth Edison's (hereinafter sometimes "Edison" or "Respondent's") Motion For Dismissal of Complainant's Formal Complaint. For the reasons hereinafter made, neither of the Hearing Examiners assigned to this matter, nor the Commission has authority to grant the relief Edison requests. No relief is authorized.

EDISON'S MOTION IS DEFECTIVE

Edison's motion is directed to Moenning's formal complaint. The motion seeks dismissal with prejudice for failing to state a claim for which relief can be granted.

Even though Edison's motion is directed to the Commission, the Commission has no authority granted it by statute from the Legislature to grant the requested relief. See Sections 200.500 (d) and Section 200.820. Likewise the Administrative Procedure Act, 5 ILCS 100/1-1 *et. seq.* contains no authority to allow Edison final disposition of Moerning's complaint. For this reason, alone, the Commission is powerless to aid respondent. In *Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 136 Ill 2d 192, 243, 555 N.E.2d 693 (1990)*, the Supreme Court answered Edison's assertions of Commission power, stating:

> "An administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction."

Again in *Business and Professional People For the Public Interest v. The Illinois Commerce Commission, 146 Ill 2d 175, 195, 585 N.E.2d 1032 (1991)* after repeating the fact that the Commerce Commission is an administrative agency whose power is derived from the legislature to make findirgs of fact, the Court, at page 196, stated:

> "Accordingly, our review of the Commission's orders is limited to determining whether the Commission: acted within the scope of its statutory authority,; . . . "

Since, respondent's motion contains no authority to the contrary, and indeed contains no authority period for its draconian action, it is sufficient for the Hearing Examiners o follow the law given them by the legislature and

to keep in focus the duty of the Commerce Commission is to determine facts; there is no judicial function intended by the legislature, at least until there are findings of fact.

Thus, Section 200.500 (d) proscribes action by the hearing Examiners on motions which result in a final determination. So there is no mistake, Edison asks for *final* relief beyond the Commission's authority or jurisdiction by statute. Pursuant to subsection (f) the hearing examiner has authority to issue recommendation or proposed orders pursuant to Section 200.820. Yet, that section requires the Hearing Examiner to make a recommended or proposed order **after the close of evidentiary hearings**. There has been no evidentiary hearing and in fact the thrust of Edison's submission seeks to avoid an evidentiary hearing.

Edison seems obsessed with the notion that the Commission is a court or has the power of a court. The Supreme Court has ruled to the contrary. Since the legislature has never given the Commerce Commission or Edison, a regulated body, authority to dismiss any complaint with prejudice prior to an evidentiary hearing, Edison's motion must be denied.

THE FORMAL COMPLAINT

It is vital to this case to remember Moenning's formal complaint was only filed after Edison violated Section 280.160, claiming its records were "confidential." The Commission allowed Edison to violate Section 280.160 and to demand a deposit in violation of Section 280.60 (e); the Commission was powerless to order Edison to comply with Section 280.160, including the "duty of hearing,

in person, any dispute by an applicant, customer or user." In fact, the Commission even endorsed Edison's violation stating that if Edison claimed Moenning's records were "confidential" then it was so. Moenning was forced to file this Formal Complaint or yield to Edison's abuse of statutory authority the Formal Complaint, Moenning stated the specific statutes Edison violated: 220 ILCS 5/9-101; and 83 Illinois Administrative Code Parts 280.50, 280.60, and 280.70. Edison's motion that "Nowhere in the Complaint does he point to any act or omission of ComEd that violates the law." is in error. See Formal Complaint, page 1 and paragraphs 2 through 5. What is novel, if not remarkable is the argument at page 6 of Edison's Memorandum that "Complainant's *Confidentiality* claim is immaterial and moot since as a result of the formal complaint Edison now asserts (1) Moenning has failed to show Edison has a duty of hearing in person any dispute in person and ***shall explain the Complainant's account*** (Section 280.160); and, (2) even so, Edison has now complied with the rule. The relevant question must be by what authority does Edison claim "confidentiality" when no statute, rule, or regulation allows Edison to set up the claim in the first place. Indeed, when did the legislature shift the burden of proof to the customer.

The major portion of Edison's unauthorized and illegal motion concerns its argument regarding its request for a deposit. Moenning can concede for purposes of argument only that paragraphs 6, 7, and 8 of the formal complaint might well be repleaded and made more specific and precise in nature. Indeed, Edison's motion reveals the salient fact in dispute in this matter: whether **Edison terminated Moenning's service in error** and whether its

records fail to disclose Moenning's telephone call and stated intent to pay the amount actually paid on June 11, 1997, ***prior to termination.***

To the extent Edison believes the complaint is "coy" (page 3), it is important to remember the complaint was filed based upon Edison's allegations of lawful conduct, and Moenning's incomplete knowledge of Edison's claim of authority. Moenning indeed intends to file an amended complaint to address Edison's concerns, though this is better done after the Hearing Examiner compels Edison to comply with discovery. See Motion To Compel Discovery and Other Relief filed contemporaneously with this Memorandum.

Given the discovery allowed by Edison and the discovery refused by Edison, it borders on unethical conduct for Edison's counsel to claim no contested facts in this matter.

It should be observed that Edison continues to assert matters not of record in order to avoid an evidentiary hearing in this case. The fact that Moenning has twice done legal battle with Edison (Dockets 81-0382 and 83-0475), 17 years ago has no relevant significance other than perhaps Edison is accustomed to getting its way without argument, and apparently resents Moenning's reluctance to endorse Edison's abuse of authority. Edison does not even disclose to the hearing examiners by its submission that Docket 81-0382 was reversed in the Appellate Court. See Commission Counsel J.E.Weging's, 1-14-94, correspondence regarding a stipulation to dismiss, executed after Edison had abandoned its abuse of statutory authority.

Moenning believes an amended formal complaint is required to address Edison's current abuse of authority and this Commission's need to be apprised of the stated legislative authority for Sections 280.10 *et. seq.* Thus, Moenning intends to challenge Edison's reliance upon Section 280.60 (e) and its application to residential customers since Title 83 Part 280, Sections 280.10 through 280.200 are expressly intended to implement "the Small Business Utility Deposit Relief Act, 220 ILCS 35 and Section 8-101 and 8-207 of the Public Utilities Act 220 ILCS 5-8-101 and 8-207. Moenning seeks by an amended formal complaint to show evidence (facts to be obtained from Edison when it is required to allow discovery) that Title 83 Part 280 was never authorized by the Legislature to apply to residential customers. In this context Moenning's present allegations contained in paragraphs 6, 7, and 8 while perhaps inartfull or not sufficiently precise do not merit dismissal with prejudice. Any person familiar with prior dockets cited by Edison knows in a moment the citation of matters not of record in this matter are not authority for dismissal with prejudice.

Indeed, the Commerce Commission is required to take and consider evidence on the issues that are the subject of state law; i.e. whether 220 ILCS 5/8-101's requirement that all rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable permits Edison to claim Moenning's records of service are confidential; and whether 220 ILCS 5/9-101's requirement that all rates or other charges made, demanded or received . . . for any service rendered or to be rendered shall be just and reasonable, and whether Edison's demand that

Moennning pay it a deposit for erroneous termination is prohibited by the statutory requirement: Every unjust or unreasonable charge made, demanded or received for such . . . service is hereby prohibited and declared and unlawful.

CONCLUSION

For the reasons asserted in this memorandum Edison's Motion For Dismissal must be denied.

RICHARD C. MOENNING

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
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312-263-0062 (voice)
312-263-0064 (facsimile)

APPEAL FROM THE
ILLINOIS COMMERCE COMMISSION

TO

THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

RICHARD C. MOENNING	)	
FORMAL COMPLAINANT	)	97-0528
V.	)	
COMMONWEALTH EDISON COMPANY	)	
RESPONDENT	)	

NOTICE OF APPEAL

(Filed Dec. 18, 11:25 a.m. 1998)

Richard C. Moenning, the undersigned "Complainant", appeals from the decision of the Illinois Commerce Commission served September 25, 1998, denying his complaint against Commonwealth Edison Company, and the decision of the Illinois Commerce Commission served November 20, 1998, denying his verified application for Rehearing timely filed October 26, 1998, and received by the Commission, October 27, 1998.

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above

Notice of Appeal upon the Clerk of the Illinois Commerce Commission by UPS Next Day Air Private Courier Service, December 17, 1998, before the hour of 9:00 P.M., prepaid.

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOR THE FIRST JUDICIAL DISTRICT
FROM THE ILLINOIS COMMERCE COMMISSION

RICHARD C MOENNING FORMAL COMPLAINANT APPELLANT V. COMMONWEALTH EDISON COMPANY RESPONDENT APPELLEE	)	COMMISSION DOCKET 97-0528

NOTICE OF FILING OF NOTICE OF APPEAL

To Karen Kremer Mahoney
Hopkins & Sutter
70 W. Madison
Suite 4100
Chicago Ill 60602

Clerk,
Illinois Commerce Commission
527 E. Capitol Ave
Springfield, Ill 62794

Please take notice that Thursday, December 24, 1998, I caused to be filed the foregoing Notice of Appeal in the above-entitled cause with the clerk of the Illinois Appellate Court, First Judicial District, a copy of which is served on you.

/s/ Richard C. Moenning
Appellant

CERTIFICATE OF SERVICE

I, the undersigned lawyer, certified, I served the foregoing Notice of Appeal and Notice of Filing by depositing the same in the U.S. Mail, First Class Postage Affixed, Addressed to the above named persons December 24, 1998, before 5:00 P.M. at The Loop Postal Station.

/s/ Richard C. Moenning
Lawyer

Richard C. Moenning 47034
Lawyer
135 S. LaSalle St. Suite 3600
Chicago Ill 60603
312 263 0062

APPEAL FROM THE ILLINOIS COMMERCE COMMISSION TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

RICHARD C. MOENNING	)	
FORMAL COMPLAINANT	)	97-0528
V.	)	
COMMONWEALTH EDISON COMPANY RESPONDENT	)	

NOTICE OF APPEAL

(Filed Dec. 18, 11:25 a.m. 1998)

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_____

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above Notice of Appeal upon the Clerk of the Illinois Commerce

Commission by UPS Next Day Air Private Courier Service, December 17, 1998, before the hour of 9:00 P.M., prepaid.

Richard C. Moenning, 47034
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312-263-0062 (voice)
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99-0232

ILLINOIS APPELLATE COURT
FOR THE FIRST DISTRICT

RICHARD C. MOENNING	)	
Petitioner	)	Petition For Review
V.	)	of Order of the
ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY	)	Illinois Commerce Commission
Respondents	)	

MOTION FOR LEAVE TO APPEAL

Richard C. Moenning, respectfully moves this Honorable Court, pursuant to Rule 303(e) of the Rules of the Illinois Supreme Court for Leave To Appeal from the order of the Illinois Commerce Commission served September 25, 1998, denying his complaint against Commonwealth Edison Company, and the order of the Illinois Commerce Commission served November 20, 1998, denying his verified application for Rehearing timely filed October 26, 1998, and received by the Commission, October 27, 1998, and in support thereof verily states:

1. Richard C. Moenning (hereinafter sometimes "Moenning") is the formal complainant in proceedings against Commonwealth Edison before the Illinois Commerce Commission.

2. The Illinois Commission entered its order served September 25, 1998, denying his complaint against Commonwealth Edison Company. A verified application for

Rearing was timely filed October 26, 1998, and this was denied by the order of the Illinois Commerce Commission served November 20, 1998,

3. A timely Notice of Appeal was filed December 18, 1998, with the Clerk of the Illinois Commerce Commission, pursuant to 220 ILCS 5/10-201 (Appeal) and on December 24, 1998, upon receipt of the stamped Notice of Appeal from the Clerk of the Illinois Commerce Commission, Moenning complied with that portion of the statute which states: "The party serving such notice of appeal shall, within 5 days after the service of such notice upon the Commission, file a copy of the Notice, with proof of service, with the Clerk of the Court to which such appeal is taken, and thereupon the appellate court shall have jurisdiction over the appeal."

4. On January 11, 1999, certification of a single transcript was requested; and, on January 15, 1999, Moenning was notified by the Clerk of the Illinois Commerce Commission that the Clerk of the Appellate Court had not assigned a docket number. Upon prompt inquiry, January 19, 1999, Moenning was directed by the Administrative Attorney of the Appellate Court to file a Petition For Review as provided in Rule 335 of the Rules of the Illinois Supreme Court and to proceed pursuant to Rule 303(e).

5. The Notice of Appeal, the Notice of Filing of Notice of Appeal, and an Amended Notice of Filing time stamped respectively by the Office of the Clerk of the Illinois Commerce Commission and by the Office of the Clerk of the Illinois Appellate Court, together with a proposed Petition For Review, and a $25.00 docketing fee are attached to this Motion and made a part thereof.

7. The explanation for failure to obtain a docket number in this court, December 24, 1998, and to prepare and file a Petition For Review to comply with Rule 335, is that petitioner focused upon compliance with the apparent exclusivity of 220 ILCS 5/10-201 (Appeal) to the exclusion of Rule 335. Except for application of Rule 335, petitioner has perfected his appeal from the order of the Commerce Commission in reliance upon 220 ILCS 5/10-201.

WHEREFORE, petitioner respectfully seeks leave of the Appellate Court to file a Petition For Review Instanter as of December 24, 1998, and to proceed with this appeal in as much as there has been timely compliance with the applicable statute, and for other and further relief as in the premises is just and equitable.

RICHARD C. MOENNING

PROOF OF SERVICE

I, the undersigned lawyer, pursuant to 220 ILCS 5/10-201, the Code of Civil Procedure and the Rules of the Illinois Supreme Court certify I served the above Motion For Leave To Appeal upon the Clerk of the Illinois Commerce Commission by UPS Next Day Air Private Courier Service, January 20, 1999, before the hour of

9:00 P.M., prepaid, and upon Commonwealth Edison by United States first class mail, postage prepaid.

Richard C. Moenning, 47034
135 S. LaSalle Street, Suite 3600
Chicago, Illinois 60603
312-263-0062 (voice)
312-263-0064 (facsimile)

No. 99-0232

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD C. MOENNING Complainant-Appellant, v. ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY, Respondent-Appellees.	)	Petition For Review of Order of Illinois Commerce Commission Case No. 97-0528

COMMONWEALTH EDISON COMPANY'S MOTION TO DISMISS APPEAL

Respondent Commonwealth Edison Company ("ComEd"), by its attorneys, Hopkins & Sutter, pursuant to Supreme Court Rule 361, respectfully moves the Illinois Appellate Court, First District to dismiss this appeal for lack of subject matter jurisdiction and failure to name the necessary parties. In particular, Appellant failed to perfect his appeal as required under Section 10-201 of the Public Utilities Act ("PUA"), 220 ILCS 5/10-201, failed to filed a timely petition for review under Supreme Court Rule 335, and failed to name all necessary parties as required under 83 Ill. Admin. Code 200.890(b). In support of this motion, ComEd states:

Procedural Background

1. On October 15, 1997, Mr. Richard C. Moenning ("Appellant") filed a complaint against ComEd with the Illinois Commerce Commission ("Commission"). On September 25, 1998, the Commission entered an order dismissing Appellant's complaint with prejudice for failing to state a claim. Appellant filed a petition for rehearing with the Commission which was denied on November 20, 1998.

2. On December 17, 1998, Appellant filed a notice of appeal with the Commission, failing to name the Commission as a respondent.

3. Seven days later, on December 24, 1998, Appellant filed this notice of appeal with this Court, again failing to name the Commission as a respondent. Appellant did not serve this notice of appeal on the parties until December 30, 1998.

4. Because Appellant did not file a petition for review as required under Supreme Court Rule 335, this Court did not docket the appeal based on the above referenced notice of appeal.

5. On January 20, 1998, Appellant filed a petition for review with this Court. This petition for the first time named both ComEd and the Commission as respondents.

Appellant Failed To File A Timely Notice Of Appeal With the Appellate Court

6. Section 10-201 of PUA, 220 ILCS 5/10-201, requires that any party wishing to appeal a Commission decision file a notice of appeal with the clerk of the

Commission within 35 days of the date that a copy of the order or decision sought to be reviewed was served upon the party. 220 ILCS 5/10-201(a). Section 10-201 further states, in part:

> The party serving such notice of appeal shall, within 5 days after the service of such notice upon the Commission, file a copy of the notice, with proof of service, with the clerk of the court to which such appeal is taken, *and thereupon the appellate court shall have jurisdiction over the appeal.*

220 ILCS 5/10-201(b) (emphasis added).

7. Appellant failed to file a copy of his notice of appeal within 5 days as required under Section 10-201(b) of the PUA. He filed his notice of appeal on the Commission on December 17, 1998, but did not file a copy of such notice with the appellate court until December 24, 1998, seven days later. Because he did not comply with Section 10-201 of the PUA, Appellate failed to perfect his appeal and jurisdiction was not conferred on this Court.

8. It is well-settled that a "court sitting in review of a decision of the Commission is in the exercise of a special jurisdiction, and such appeals must be prosecuted in accordance with the requirements of the Public Utilities Act to be legally effective." *Ferndale Heights Utility Co. v. Illinois Commerce Commission*, 112 Ill. App. 3d 175, 178, 445 N.E.2d 334, 337 (1st Dist. 1982).

9. Therefore, this Court does not have jurisdiction over the appeal and it should be dismissed.

Appellant Failed To File A Timely Petition For Review With the Appellate Court

10. Supreme Court Rule 335 requires that a party seeking direct review of an order of an administrative agency shall file a petition for review in the Appellate Court. Sup. Ct. R. 335(a).

11. Section 10-201 of the PUA requires that a party seeking review of a Commission decision appeal "[w]ithin 35 days from the date that a copy of the order or decision sought to be reviewed was served upon the party. . . . " 220 ILCS 5/10-201(a).

12. The Illinois Supreme Court has held that the period within which to file a petition for review with the Appellate Court for direct review of administrative decisions is the deadline set forth for the filing of the notice of appeal. *County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Board*, 144 Ill.2d 326, 331, 579 N.E.2d 866, 869 (1991) (dismissed appeal where petition for review was filed 32 days after entry of final judgment, rather than within the 30-day deadline set forth in Supreme Court Rule 303).

13. Appellant did not file a petition for review within either the 30-day timeframe set forth in Supreme Court Rule 303, Sup. Ct. R. 303(a), or the 35-day time frame specified in Section 10-201 of the PUA, 220 ILCS 5/10-201(a). He did not file a petition for review until January 20, 1999, 61 days after the final decision was issued by the Commission.

14. Appellant has failed to demonstrate a reasonable excuse for failing to file a petition for review on

time. Appellant's stated reason for failing to file a petition for review is essentially that he neglected to look at the Supreme Court Rules. (Appellant's Motion for Leave to Appeal, ¶ 7).

15. Therefore, this Court does not have jurisdiction over the appeal and it should be dismissed.

Appellant Failed To Name A Necessary Party In His Notice of Appeal

16. In his notice of appeal filed with both the Commission and the Appellate Court, Appellant failed to name the Commission as a respondent as required by the Commission's Rules of Practice.

17. Section 200.890(b) of the Commission's Rules of Practice clearly provides:

> Notice of appeals under Section 10-201 of the Public Utilities Act [220 ILCS 5/10-201] shall be served on all other parties of record. The notice of appeal filed with the Commission shall be captioned "(The name of appellant) v. Illinois Commerce Commission." In the body of the notice the appellant shall state the name and number of the Commission Docket, the order or orders appealed, but shall otherwise follow the form established by the Supreme Court Rules.

83 Ill. Admin. Code 200.890(b).

18. In the notice of appeal filed with the Commission and with the Appellate Court, Appellant failed to name the Commission as a respondent as required by Section 200.890(b) of the Commission's Rules of Practice.

19. Appellant has failed to name the Commission as a respondent in previous appeals involving these same parties and is on notice of his obligation to do so. In *Moenning v. Commonwealth Edison Company*, 134 Ill. App. 3d 468, 481 N.E.2d 36 (1st Dist. 1985), Appellant similarly failed to name the Commission as a necessary party and this issue was thoroughly litigated. Because there was no Commission rule or statute, at that time, requiring the Commission be named as a respondent in the caption of a notice an appeal, the court allowed Appellant to amend the notice of appeal and remanded the cause for further proceedings. *Moenning*, 134 Ill. App. 3d at 470, 481 N.E.2d at 39. However, the Commission's Rules of Practice have since been amended to expressly require that the Commission be named in the captioning of a notice of appeal. 83 Ill. Admin. Code, 200.890(b).

20. The Illinois Supreme Court has held that where the procedural requirements for judicial review of an administrative decision require that the agency be named as a party, failure to name the agency within the statutory time limit for filing the notice of appeal bars the action for administrate review. *Lockett v. Chicago Police Board*, 133 Ill.2d 349, 356, 549 N.E.2d 1266, 1269 (1990) (dismissed appeal where litigant failed to name superintendent of the Chicago police board as a defendant within 35 days of the decision being appealed as required under the Administrative Review Law). *See also Hanke v. Department of Professional Regulation*, 296 Ill. App. 3d 825, 696 N.E.2d 12 (1st Dist. 1998).

21. Furthermore, Appellant is an attorney certified to practice law in the State of Illinois. He is not a pro se

complainant and has no excuse for failing to follow the procedural rules of this Court and of the Commission.

WHEREFORE, because Appellant failed to perfect his appeal under 220 ILCS 5/10-201(b), failed to file a timely petition for review as required under Supreme Court Rule 335, and failed to name the Commission as a necessary party as required by 83 Ill. Admin. Code 200.890(b), Commonwealth Edison Company moves the Appellate Court, First District to dismiss this appeal.

Respectfully,

/s/ Karen Kremer Mahoney
Attorney for Commonwealth Edison Company

Dated: March 8, 1999

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